

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Amendments to Rules of Practice and Procedure

Docket No. RM2013-1

COMMENTS OF THE PUBLIC REPRESENTATIVE

May 17, 2013

The Commission proposes “minor” amendments to its Rules of Practice and Procedure appearing at 39 CFR part 3001.¹ The minor amendments are a step in the right direction. However, the Public Representative suggests that the Commission undertake a more comprehensive review of its Rules of Practice and Procedure to address inconsistencies, remove outdated rules, and assure that rules conform with current practice before the Commission. The comments that follow include suggestions for a more comprehensive update of the rules.

Rule 3001.5. Definitions applicable to the Commission’s Rules of Practice and Procedure can be found in rule 5. Parts 3003, 3005, 3007, 3025, and 3050 also contain sections providing definitions. Differing definitions are provided in various parts for the same terms, for example for “petitioner” and “Commission.” Some terms are not used in the part where the definitions appear, for example for “Negotiated service agreement,” “Product,” and “Rate or class of general applicability.” See § 3001(r), (t), and (u). There is a tradeoff between providing all definitions in one location, and providing definitions in the sections where applicable. The Public Representative suggests moving all general definitions to one location (e.g., part 3001), and removing

¹ Order No. 1677, Notice of Proposed Rulemaking Regarding Minor Amendments to the Rules of Practice, March 19, 2013.

duplicative definitions. Limited exceptions can be made for clarity, with definitions that only pertain to specific parts.

The Public Representative suggests the definitions of the classes of persons appearing before the Commission, such as “Party,” “Participant,” “Complainant,” “Appellant,” etc., are incomplete, confusing, and require revamping. The current definitions for classes of persons were formulated at a time when there was an Office of the Consumer Advocate (OCA), and there was a real expense to serving documents on others. At that time, distinctions between a party, participant, limited participator, OCA, etc., might have been appropriate. The OCA no longer exists, a Public Representative has difference rights and responsibilities under the PAEA, and electronic filing is now the norm.

The rules could be simplified by eliminating some of the less useful distinctions. Conceptually, a suggested starting point would be to treat formal participants and limited participators identically. Limited exceptions could be developed to protect certain interested persons from being subject to discovery, if necessary. As discussed below, this may eliminate some of the confusion to references to a participant within the rules.

As now written, the definitions are confusing and must be read in combination with other definitions to be given any meaning. For example, rule 5(h) defining “Participant” must be read in combination with rule 5(g) defining “Party” to evaluate the effect of either term within the Commission’s rules.

Additionally, some definitions are conditional, and must be referenced when interpreting any other rule in the Rules of Practice and Procedure. This is especially true when considering paragraph (h). A reader must refer back to this paragraph whenever reading any other rule in the rules of practice to determine the meaning of “participant” on that particular rule. The Public Representative suggests amending each rule such that referring back to paragraph (h) becomes unnecessary.

With the changing responsibilities of the Public Representative under the PAEA, the definition of Party needs to be updated. The definition of Party originally excluded the equivalent of the Public Representative, and when read in combination with the definition of Participant continues to excluded the Public Representative. However, the PAEA allows a Public Representative to file a complaint (§ 3662), which would appear to make the Public Representative a Party.

Furthermore, the definition of Party includes an Appellant. The term Appellant appears to have been replaced by the term Petitioner, which does not appear in the definition of Party. If there is another meaning to the term Appellant, a definition may add clarity to the rules.

The confusion continues when determining who is a Party when considering intervention. The definition of Party in paragraph (g) includes “a person who has intervened in a proceeding before the Commission.” Both persons filing formal intervention under rule 20, and filing limited participation by persons not parties under rule 20a, file notices of intervention and thus intervene in Commission proceedings. However, persons filing under rule 20a are not considered a Party to the proceeding (or the conditionals in paragraph (h) are meaningless).

The Public Representative observes the absence of a definition for a person considered a “commenter.” Many Commission proceedings only allow interested persons to submit comments. This class of person also has to follow the rules of practice, for example, in filing documents with the Commission. However, this class of person is neither defined nor mentioned in the rules of practice.²

The Commission proposes to amend rule 3001.5(j) to eliminate obsolete references to title 5 and include additional references to part 3001. The Public Representative suggests the following wording to eliminate redundancies in the

² Care must be taken to distinguish this class of persons from “commenters” as specifically described in rule 20b. Although both classes file comments, their respective rights and requirements are very different.

proposed language and to clearly provide the reader with helpful information without having to refer to other sections of the CFR:

Hearing means a proceeding convened to address a change in the nature of postal services and held pursuant to section 556 and 557 of title 5 as provided by 39 U.S.C. 3661, a complaint as provided by 39 U.S.C. 3662, or any issue formally noticed at the discretion of the Commission. Proceedings may be undertaken entirely in writing, by requiring physical appearances, or through a combination of the above.³

Rule 3001.7. The Public Representative suggests clarifying the ex parte communication rule to specifically exclude (within the rule) Public Representatives from the definition of “decision-making Commission personnel.” Public Representatives frequently are Office of the General Counsel or the Office of Accountability and Compliance staff members.

Rule 3001.9. The Public Representative observes that the terminology in the rule for filing of documents is not consistent with the terminology that appears physically on documents filed online. The rule uses the terms “filed” and “accepted” whereas documents are stamped with the terms “submitted” and “accepted.” Furthermore, when a document is cited by the Commission, the Commission frequently uses the terms “filed on” before the date, when it is in fact referring to the accepted date.⁴ Post office closing dockets add another variant by in some instances relying on the postmark date of documents, rather than the date the document was accepted and posted to the website. It appears that the terminology had not been updated when transitioning from a paper-based world to the modern electronically docketing system. The Public Representative advocates the use of consistent terminology.

Rule 3001.10. The Public Representative observes that the Postal Service must file requests for changes in rates and classifications in both online and hardcopy form

³ Note that this definition may conflict with the terms “hearing cases” and “non-hearing cases” appearing in rule 18.

⁴ This is because documents can be easily located online by the accepted date, and not by the filed or submitted dates.

(3001.10(a)(4)). The Public Representative questions whether it is still necessary to file hardcopy with the advent of filing online.

Rules 3001.12. The Commission interchangeably appears to use the terms “Web site” and “website” in rule 12. The Public Representative suggests consistently using only one of the two terms throughout the rules.

Rules 3001.20, 20a, and 20b. The Public Representative suggests a change to the rule on formal intervention appearing at § 3001.20(c). In some dockets, a late filing of intervention has been granted by the presiding officer, and in others, by Commission order. The Public Representative suggests changing paragraph (c) to clearly allow the presiding officer to grant late interventions. In almost all instances, motions for late intervention are granted. In instances of apparent controversy or very late filing, the presiding officer always has the ability to present the matter to the full Commission. This change would reduce paperwork, and streamline the process for late interventions.

Rule 20b addresses “commenters.” This class of commenters is not the same class of commenter that comment on rulemakings, or in the ACD for example, which may be confusing. The Public Representative suggests developing specific rules for the class of interested persons commenting in rulemakings, the ACD, etc. Written policies are also needed to distinguish when a comment is a formal comment and posted online and readily available for all to see, versus a less formal comment placed in a comment file which requires a physical presence to review.

Rules 3001.21 and 23. The Commission proposes amending the rules on motions and presiding officers by changing references to “initial decisions” and “recommended decisions” to references to “intermediate decisions.” Current practice before the Commission does not include issuing intermediate decisions (and it is unlikely for this event to occur in the future), the Public Representative suggests deleting references to intermediate decisions in the rules and rewriting accordingly.

Rule 3001.24. The Commission proposes minor conforming changes to the rule governing prehearing conferences. The Public Representative observes that paragraph

(a) references expedition of advisory opinions under § 3661, but does not do the same for complaints under § 3662. The Public Representative suggests that it may be appropriate to expedite § 3662 complaints as well.

The Public Representative suggests that the phrase “the Commission’s officer designated to represent the interests of the general public” appearing in paragraph (b) be changed to “Public Representative.”

The Public Representative suggests changing the title of paragraph (c) from “Required preparation and cooperation of all parties.” to “Required preparation and cooperation of all participants.” As written, the title excludes the Public Representative from cooperation because by definition a Public Representative is not a party.

Paragraph (e) concerning prehearing conference rulings by the presiding officer does not address the case where the Commission is sitting *en banc* for a prehearing conference prior to the assignment of a permanent presiding officer. If this is the intent, then no action is required. If this is an omission, authority for the Commission sitting *en banc* to issue rulings should either be added to the paragraph or added to a new paragraph addressing this situation.⁵

Rules 3001.25, 26, 27 and 28. Rules 3001. 25, 26, 27 and 28 comprise a series of rules dealing with discovery: § 3001.25 Discovery—general policy; § 3001.26 Interrogatories for the purpose of discovery; § 3001.27 Requests for production of documents or things for purpose of discovery; and § 3001.28 Request for admissions for the purpose of discovery.

The Commission proposes to delete obsolete references to §§ 3622, 3623, and 3662 from § 3001.25(a). The Public Representative suggests § 3662, rate and service complaints, is not obsolete and reference to it should be retained in § 3001.25(a).

⁵ Another option is to develop rules that specify who temporarily “presides over a hearing” when a “presiding officer” has not been appointed.

Rule 26(a) states “any participant may propound to any other participant in a proceeding written, sequentially numbered interrogatories....” The definition of Participants in § 3001.5(h) does not include limited participators. However, in practice, limited participation by persons not parties under rule 20a have been allowed to propound interrogatories. The Public Representative suggests that either the rules be modified to include limited participators, or the rules be enforced. Similar situations exist in rules 27 and 28.

Rule 3001.30. The Commission proposes minor conforming changes to the rule governing hearings. The Public Representative suggests additional changes to the statement appearing in paragraph (e)(2): “When a participant designates written cross-examination, two hard copies of the documents to be included shall simultaneously be submitted to the Secretary of the Commission.” The requirements for the documents to be single-sided, without staples, and without hole punches should be added.

Section (h) authorizes the presiding officer to rule on motions during the hearing. The Public Representative suggests adding clarification to specify who will rule on motions when a presiding office has not been appointed and the Commission is sitting *en banc*.

Rule 3001.31. The Commission proposes minor conforming changes to the rule governing evidence. To be consistent with filing online requirements, the Public Representative also suggests eliminating the requirement to file eight copies of all prepared testimony and exhibits (3001.1(g)). The Public Representative further suggests changing “Provided, That” to “Provided, that” in 3001.1(j).

Rule 3001.32. The Commission proposes conforming changes to paragraph (f) of the rules governing appeals from rulings of the presiding officer. The current practice before the Commission does not include issuing intermediate decisions (and it is unlikely for this event to occur in the future), the Public Representative suggests deleting references to intermediate decisions in the rules.

Thus, the first sentence of paragraph (a) might be shortened to: “Before the record is closed, rulings of the presiding officer may be appealed when the presiding officer certifies in writing that an interlocutory appeal is warranted.” Another option for “Before the record is closed” might be “Before the final decision or advisory opinion is issued.” Paragraph (f) might be shortened to “If an interlocutory appeal is not certified pursuant to paragraph (b)(1) of this section, objection to the ruling may be raised in the participants’ briefs in accordance with § 3001.34.”

Rule 3001.33. The Public Representative suggests updating the rule on depositions to reflect the Commission’s filing online requirements. The rule requires the filing of an application for deposition “in duplicate” (3001.33(b)), and specifies the “number of copies” of transcript in several instances (3001.33(c) and (e)). This wording is inconsistent with filing online.

Rules 3001.36, 38, 39 and 40. Rules 3001.36, 38, 39 and 40 comprise a series of rules dealing with intermediate decisions: § 3001.36 Oral argument before the presiding or other designated officer; § 3001.38 Omission of intermediate decisions; § 3001.39 Intermediate decisions; and § 3001.40 Exceptions to intermediate decisions.

The Public Representative suggests eliminating these rules in their entirety (including references to these rules that might appear in other sections). The practice of issuing initial, intermediate, or tentative decisions does not conform with current practice before the Commission. The rules have not been used by some estimates in approximately 30 years.

Regardless, the Commission proposes to change the last sentence of rule 3001.39(c) to read “An intermediate decision in a proceeding under section 3661 of the Act shall include a determination of the question of whether or not the proposed change in the nature of postal service conforms to the policies established under the Act.” This implies a yes/no affirmation that a Postal Service proposal does, or does not conform with the Act. However, in the case of final decisions, the Commission rarely makes such an affirmation. The Public Representative suggests that the rule concerning

intermediate decisions be made consistent with what is typically issued as a final decision.

Rule 3001.43. The Commission proposes minor amendments to rule 3001.43 governing public attendance at Commission meetings. This rule, in part, establishes procedures for requesting open or closed meetings by filing ten hard copies of a request with the Office of Secretary and Administration. The Public Representative suggests updating this rule such that requests could be electronically filed online, with hard copy filing as a backup.

Rule 3001.75. The Commission proposes to amend rule 3001.75 to read “The provisions of § 3001.12 govern the Postal Service’s service requirements for proceedings conducted under the subpart. Service must be made on all participants as defined in § 3001.5(h).” The Public Representative suggests that this rule is unnecessary and should be deleted in its entirety. Rule 3001.71 already states that the Rules of General Applicability (which includes § 3001.12) are applicable to requests for changes in the nature of postal services where rule 3001.75 appears.

If not deleted, the Public Representative would then suggest at least adding “3001.75” to the definitional list appearing in § 3001.5(h) so that it is clear that “participants” includes “limited participators” in this instance.

Respectfully submitted,

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